No. 4247

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES WEDEL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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STATEMENT.

Charles Wedel prosecutes a writ of error to the United States District Court for the Northern District of California to reverse the order of that court adjudging him guilty of contempt of a previous order of the court and ordering that he be imprisoned in the County Jail of Sonoma County for six months, pay a fine of $500 or in default of the payment of said fine that he be further imprisoned for a period of five months in the same jail. The contempt charged in the information filed was that the defendant on the 20th day of January, 1924, violated the provisions of a temporary injunc-

tion theretofore issued by the court in a suit in equity brought under the provisions of Sections 21 and 22 of Title II of the National Prohibition Act to abate a nuisance on certain premises particularly described.

In the record presented here there is included the information filed against defendant seeking an order that he be adjudged guilty of contempt, together with Exhibit "A", being the affidavit of one C. W. Ahlin, setting forth the commission of acts constituting the contempt. There is also included the original order for temporary injunction made in the abatement suit (Trans. Rec. p. 10) and the writ of injunction issued thereunder, together with a return of service thereof. (Trans. Rec. pp. 11, 12 and 13.) Following the filing of the information the court ordered an attachment which was thereupon issued. The attachment and the Marshal's return of service thereof appear in the Transcript of Record at pages 14, 15 and 16. The defendant appeared, there was a hearing, whereupon the court found the defendant guilty and punished him as aforesaid. (Trans. Rec. p. 17.)

The original bill of complaint in the abatement suit is not supplied, nor any affidavits that may have been filed in support of the application for a temporary injunction. It is stated, however, in the brief for plaintiff in error that the bill in equity was filed on January 27, 1923, seeking in the name of the United States to abate and enjoin a common

nuisance, to wit, the violation of Section 21 of Title II of the National Prohibition Act, which was alleged to *exist* in a hotel designated as the "Speedway Hotel" at Cotati, Sonoma County, California. The brief further sets forth that it was alleged that defendant was the owner of the said property and the business, and that on January 31, 1923, the Judge of the said court ordered that a temporary writ of injunction should issue restraining the defendant from certain acts. It further appears that defendant answered and that the abatement suit was pending at the time of the proceeding had of which complaint is made.

It thus appears that an action against the defendant to abate a nuisance at the "Speedway Hotel", Cotati, Sonoma County, California, was filed January 27, 1923; that the Judge of the said court on January 31, 1923, issued an order for a temporary writ of injunction which was served on the defendant on the 10th day of February, 1923; that thereafter, to wit, on January 20, 1924, while the action was still pending, one C. W. Ahlin, a Prohibition Agent, entered the hotel in question and asked for and received from the waiter in possession and charge four drinks of whiskey and paid $2.00 therefor, and that the waiter serving the drinks was known to be the defendant Charles Wedel. Thereupon an information was filed on February 26, 1924, supported by affidavit of Ahlin, charging the defendant with a commission of a contempt in violation of the provisions of said injunction. The

defendant having been brought in, on March 18, 1924, there was a hearing had, the affidavit aforesaid was introduced in evidence; the defendant offered no evidence, whereupon he was convicted and punished as above stated.

POINT INVOLVED.

The brief of counsel for plaintiff in error is confined to the single question raised by them, to wit, that Section 21 of Title II of the National Prohibition Act was unconstitutional and void.

ARGUMENT.

(1) THE METHOD OF REVIEWING THE ORDER COMPLAINED OF IS PROPERLY BY APPEAL AND NOT BY WRIT OF ERROR.

It is proper to state *in limine* that the order complained of in the instant case should be reviewed by appeal and not by writ of error. The main case was a suit in equity. The particular order was made in the same proceeding, or in any event, in a special proceeding in which a jury was not allowed or allowable. In such case the review is by appeal as has recently been held by the Supreme Court of the United States in the case of

Essgee Co. vs. U. S., 262 U. S. 151, 153.

In view of the provisions of the Act of September 6, 1916, entitled "An Act to Amend the Judicial Code" (39 Stat. 726, c. 448, Sec. 4) the particular

mode of review adopted may be unimportant since the court can take appropriate action. However, the question of a proper record still remains when application is made of the action quoted. But in the instant case, since the argument of counsel is confined wholly to the constitutional question, it is believed that sufficient appears in the transcript for the court to determine the point.

(2) SECTION 21 OF TITLE II OF THE NATIONAL PROHIBITION ACT IS ENTIRELY CONSTITUTIONAL AND VALID; THE MATTER IS NO LONGER AN OPEN QUESTION.

It appears that the United States was proceeding below by suit in equity to abate a liquor nuisance brought under the provisions of Section 21 of Title II of the National Prohibition Act. Such proceeding is usually based upon the allegation that a common nuisance *exists,* that is to say, exists at the time of the filing of the bill of complaint. Since the complaint is not supplied, the matter will be presumed in favor of the government. In fact, in plaintiff's brief, top of page 2, it is stated that such an allegation was made.

That legislation of the character involved is entirely valid has been expressly decided by the Supreme Court of the United States in one of the cases reported as

Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205.

The precise point was considered in one of the cases there reported,

Kansas vs. Ziebold and Hagelin,

reference being made to the point at page 213 L. ed. 2d. It is there pointed out that legislation of that character had been enacted by the State of Kansas in 1885, and it was held generally that it is within the competency of the legislature to declare the particular act a common nuisance, although it might not theretofore have been so considered, and that having so determined, jurisdiction could be assigned to a court of equity to abate the nuisance, and, in the event of a violation of the decree or order of the court in the premises, a contempt proceeding could be instituted in which a jury would not be allowed.

The application of the holding of Mugler vs. Kansas to Section 21 of the National Prohibition Act has been made in several cases, and the section in question upheld as against an attack for unconstitutionality. One of the cases so ruling is that of

Lewishon vs. U. S., 278 Fed. 421, 427.

The same ruling upon the same point was made by the Circuit Court of Appeals of the Second Circuit in the case of

U. S. vs. Reisenwever, 288 Fed. 520, 523,

in which a large number of cases bearing on the point are reviewed.

Indeed, in the brief of plaintiff in error, page 10, it is said that they do not contend that the act is invalid insofar as it provides for the abatement of *nuisance existing or threatened,* but it seems to be urged that that portion of the act is invalid "which attempts to confer the power upon equity courts to punish for contempt any act in violation of the constitutional requirement that the trial of all crimes shall be by jury."

It is sufficient to say in response to the latter contention that the precise point was decided against them in the case of

Lewishon vs. U. S., supra, at page 428,

in which it is shown by the court that the question is foreclosed by the at least two decisions of the Supreme Court of the United States which are cited—

Eilenbecker vs. Plymouth County, 134 U. S. 131, 33 L. Ed. 801, and

In re Chapman, 166 U. S. 661, 41 L. Ed. 1054.

The principal support of counsel's contention is said to be the decision of the District Court for Nebraska in the case of

U. S. vs. Lot 29, Block 16, Nebraska, et al., 296 Fed. 729.

But if the opinion in that case is to be deemed to be to the effect that the legislation is unconstitutional, it is in conflict with the decisions above cited. It is equally in conflict to the decision cited if it is meant to hold that the legislation, while constitu-

tional in part, is invalid as far as it deprives a respondent in a contempt case of the right of trial by jury.

But a close analysis of the decision shows that it really turned upon questions of fact; for it was reasoned that by the concession of the government the nuisance there under review had been in fact *abated before* the institution of the suit in equity. And from the circumstances apparent in the case, the court was not convinced that any future nuisance was *threatened.* In such a state of the case the same ruling would be made by any other court, but the constitutionality of the act would not be involved.

Reference may be made upon questions of procedure involved in the instant case to the case of

Allen vs. U. S., 278 Fed. 429,

wherein the Circuit Court of Appeals for the Seventh Circuit points out that where the court has jurisdiction of the subject matter, as here, the measure of the required observance of the temporary injunction order is not the bill filed but the order itself, and defendant must yield in obedience thereto whether or not a cause of action is technically or sufficiently stated by the bill. Here the order for the injunction and the injunction was very definite in restraining the acts which were afterwards committed by the defendant.

In conclusion, we submit that the question of constitutionality argued in the case at bar has been

entirely foreclosed by the decisions of the Supreme Court of the United States hereinabove cited. The order adjudging the defendant guilty of contempt for his flagrant violation of the temporary injunction should be affirmed.

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